Supreme Court, U.S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S OBJECTIONS TO THE MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.
FUSELIER, OTT, MCKEE
& FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226
Counsel for Petitioner

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	ii
Background	1
The Objections	2
I. OBJECTION NO. 1: WHETHER THE THREE ATTORNEYS ENGAGED IN CONDUCT WHICH SUBJECTED THEM TO AN ASSESSMENT OF COSTS UNDER SECTION 1927 IS NOT PROPERLY BEFORE THE COURT	2
II. OBJECTION NO. 2: THE COURT OF APPEALS' DECISION ON THE ISSUE OF WHETHER ATTORNEYS' FEES ARE INCLUDABLE AS "COSTS" UNDER SECTION 1927 IS CLEARLY FINAL	4
Conclusion	7

TABLE OF CASES AND AUTHORITIES

	Page(s)
Black v. *Cutters Laboratories*, 351 U.S. 292 (1956)	5
Malat v. *Riddell*, 383 U.S. 569 (1966)	5
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	3
NLRB v. *International Van Lines*, 409 U.S. 48 (1972)	3
United States v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975)	6
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	3
Wheeler v. *Anchor Continental, Inc.*, 20 Fair Empl. Prac. Cas. 591 (D.S.C. 1978), *appeal docketed*, No. 79-1116 (4th Cir. Feb. 14, 1979)	2
R. Stern & E. Gressman, *Supreme Court Practice* 480 (5th ed. 1978)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S OBJECTIONS TO THE MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

BACKGROUND

On March 25, 1980, counsel for Roadway was timely served with a motion for leave to file a brief *amicus curiae* submitted by the NAACP Legal Defense and Educational

Fund, Inc., in support of the respondents.[1] Roadway respectfully submits its objections to the Legal Defense Fund's request.

THE OBJECTIONS

I. OBJECTION NO. 1: WHETHER THE THREE ATTORNEYS ENGAGED IN CONDUCT WHICH SUBJECTED THEM TO AN ASSESSMENT OF COSTS UNDER SECTION 1927 IS NOT PROPERLY BEFORE THE COURT.

The rationale of the Legal Defense Fund's primary argument is foreclosed by the respondents' failure timely to file a cross-petition for a writ of certiorari. Consequently, such portions of the Legal Defense Fund's brief which advance arguments foreclosed from presentation in this Court by the respondents, are irrelevant to the disposition of this case, and barred from consideration under Rule 42(3) of this Court relating to briefs *amicus curiae*.

The Legal Defense Fund's primary argument is that "[t]he writ of certiorari should be dismissed as improvidently granted," *LDF Brief* at 3, the rationale of the argument being that "both the Court of Appeals and the district court below erroneously assumed that § 1927 was

[1] The Legal Defense Fund's brief is hereinafter cited as "*LDF Brief.*" Although not specifically mentioned in its brief, Legal Defense Fund attorneys appear as counsel of record for attorneys assessed with attorneys' fees under § 1927 in a case pending in the United States Court of Appeals for the Fourth Circuit. Wheeler v. Anchor Continental, Inc., 20 Fair Empl. Prac. Cas. 591 (D.S.C. 1978), *appeal docketed*, No. 79-1116 (4th Cir. Feb. 14, 1979).

applicable to the facts presented here." *Id.*[2] This rationale, however, was vigorously argued by the respondents in the court of appeals,[3] categorically rejected by that court,[4] and thus foreclosed from argument in this case by the respondents' failure to timely seek review of that portion of the court of appeals' judgment in this Court. *E.g.*, *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Precluding such arguments is particularly appropriate where, as in the instant case, the argument seeks to bring before the Court, without the filing of a cross-petition, findings of fact heretofore deemed settled. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

[2] Roadway refers to the argument as the Legal Defense Fund's "primary argument" for the simple reason that thirteen of the brief's twenty-four pages are devoted to discussion of the rationale for the argument. *LDF Brief* at 5-18.

[3] For example, the subject was exhaustively argued at pages 16 through 24 of the respondents' "Original Brief on behalf of Defendants-in-Rule-Appellants" submitted to the court of appeals.

[4] The court of appeals' decision reads:

> Looking first to the propriety of entering any award at all against the appellants under § 1927, we find that the district court's determinations regarding the vexatiousness of the appellants' behavior are not clearly erroneous. . . . The instances of misconduct related in the district court's ruling on the motion to assess costs and attorneys' fees adequately support the court's findings of fact concerning the vexatious manner in which the appellants conducted the lawsuit. thus, *under § 1927, the appellants are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings.* Having determined that the *appellants are liable for an award under § 1927*, we turn to the proper scope of their liability.

Pet. App. A, at 4a-5a (emphasis added) (citations omitted).

Reviewing *International Van Lines*, *Mills* and other decisions of this Court on the subject, one source summarizes the holdings as follows:

> In each of those cases the party who had prevailed below was barred from presenting an argument which would have supported the judgment in his favor because its logic would have led to the entry of a judgment which went further in his direction.

R. Stern & E. Gressman, *Supreme Court Practice* 480 (5th ed. 1978). Applying such holdings to the instant case, it is manifest that, had the court of appeals accepted the respondents' arguments that the conduct in issue was not of such a nature that the attorneys were subject to an assessment of "costs" under section 1927, the judgment of the court below would have been extended further in the attorneys' "direction."[5] Thus, in the absence of a cross-petition, presentation of arguments concerning whether the attorneys were subject to an assessment of "costs" pursuant to section 1927 is barred. The only issue properly before the Court is whether such an assessment may include attorneys' fees.

II. OBJECTION NO. 2: THE COURT OF APPEALS' DECISION ON THE ISSUE OF WHETHER ATTORNEYS' FEES ARE INCLUDABLE AS "COSTS" UNDER SECTION 1927 IS CLEARLY FINAL.

There is no basis for the Legal Defense Fund's characterization of the court of appeals' remand as being "to determine what, if any, excess costs were caused by the respondents' attorneys' unreasonable and vexatious acts

[5] Indeed, had the court of appeals decided the conduct issue favorably to the respondents, the question presented by Roadway's petition—the naked statutory issue of whether attorneys' fees may be included in an assessment of "costs" under § 1927—probably would not have been reached by the court.

or by any multiplication of the proceedings by them." *LDF Brief* at 3-4. The remand, simply and accurately stated, was for the sole purpose of removing attorneys' fees from the district court's judgment.[6]

Furthermore, from a practical standpoint, even if the remand could be construed to require a redetermination by the district court of what is and what is not an "excess" cost, the district court must first know, as a matter of law, what is and what is not a "cost" which may be "excess." This initial determination as to what is a "cost" is precisely the question presented by Roadway's petition,[7] a question which the Legal Defense Fund admits was decided adversely to Roadway. *LDF Brief* at 16. Thus, even assuming *arguendo* that the remand encompassed a requirement that the district court redetermine which portions of the costs are "excess costs," Roadway is clearly entitled to seek review of the legal standard[8] applied by

[6] The Legal Defense Fund's reliance on dicta from the court of appeals' opinion, *LDF Brief* at 18 n.12, overlooks the fact that "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutters Laboratories, 351 U.S. 292, 297 (1956).

[7] Whether attorneys who unreasonably and vexatiously multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 may be personally assessed, pursuant to 28 U.S.C. § 1927, with attorneys' fees as part of the "excess costs" incurred by an opposing party as a result of such conduct?

Pet. for Cert. at 2.

[8] In Malat v. Riddell, 383 U.S. 569 (1966), this Court was, as in the instant case, requested to construe one operative word of a statute which controlled the "legal standard" governing overall application of the provision to the facts of the case.

> Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court, for fresh fact-findings, addressed to the statute as we have now construed it.

Id. at 572.

the court of appeals in holding that attorneys' fees are not "costs" includable in a determination of "excess costs" under section 1927.[9] In any event, since the Legal Defense Fund's theory of "nonfinality" presumes acceptance of arguments which are not properly before the Court because of the respondents' failure to file a cross-petition, *i.e.* that the three attorneys' conduct was not proscribed by section 1927, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975), that theory, and thus that portion of the Legal Defense Fund's brief advancing the theory, is irrelevant to the disposition of this case.

[9] As stated by the court of appeals: "Our construction of § 1927 does not foreclose assessment of attorneys' fees against attorneys in every conceivable situation, *it merely forecloses the imposition of such liability under § 1927.*" Pet. App. A, at 7a (emphasis added).

CONCLUSION

In light of the Legal Defense Fund's primary interest in advancing arguments not properly before the Court,[10] Roadway submits that the motion for leave to file brief *amicus curiae* should be denied. Alternatively, Roadway submits that the Legal Defense Fund's motion should be granted only insofar as the brief submitted advances arguments properly before the Court.

Respectfully submitted,

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.
FUSELIER, OTT, MCKEE
& FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226
Counsel for Petitioner

[10] That limited portion of the Legal Defense Fund's brief which does not advance such arguments, *LDF Brief* at 20-23, simply recites the holdings and authorities relied upon by the court of appeals, and adds little, if anything, to this case different from the arguments advanced by the respondents in their brief.